

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

**OFFICE OF
MANAGING DIRECTOR**

APR 30 1993

DOCKET FILE COPY ORIGINAL

Lee J. Peltzman, Esq.
Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

92-308

Dear Mr. Peltzman:

This will respond to your request for refund of a hearing fee filed on behalf of Caroline K. Powley d/b/a Unicorn Slide in connection with her construction permit application for a new FM station at Slidell, Louisiana.

You state, and your documentation shows, that prior to the Notice

BARAFF, KOERNER, OLENDER & HOCHBERG, P.C.

ATTORNEYS AT LAW

6336 WISCONSIN AVENUE, N.W., SUITE 300
WASHINGTON, D.C. 20015-2003

(202) 686-3200

Hally
B. JAY BARAFF
ROBERT L. OLENDER
JAMES A. KOERNER
PHILIP R. HOCHBERG
AARON P. SHAINIS
LEE J. PELTZMAN
MARK J. PALCHICK
JAMES E. MEYERS

OF COUNSEL
ROBERT BENNETT LUBIC

March 30 , 1993

FAX: (202) 686-8282

Mr. Andrew S. Fishel
Managing Director
Federal Communications Commission
1919 M Street, N.W.
Room 852
Washington, D.C. 20554

9107168170288004

*see check copy
attached -
56 \$6760-*

Re: Refund of Hearing Fee

Dear Mr. Fishel:

On behalf of Caroline K. Powley d/b/a Unicorn Slide, applicant for a construction permit for a new television broadcast station to operate on Channel 54, at Slidell, Louisiana (File No. BPCT-900518KO), this will request a refund of the hearing fee paid by Caroline Powley on July 12, 1991 in the amount of \$6,770.00. The

0ACT-900518KO

201

CAROLINE K. POWLEY
1538 LOGAN AVENUE
ALTOONA, PA. 16602

3-2210

July 8, 1991

\$6760.00

PAY TO THE
ORDER OF

F.C.C.

Five thousand seven hundred sixty & No/100 DOLLARS

PAYABLE THROUGH FIRST PENNSYLVANIA BANK, N.A.
PHILADELPHIA, PA. 19101

PALCO FEDERAL CREDIT UNION
946 BROAD STREET
MONTGOMERY, PA. 17754



PURPOSE: Albany Fee - Slide 1/4 Caroline K. Powley

⑆031000024⑆0201⑆0770654523⑆44

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	MM DOCKET NO. 92-308
)	
CAROLINE K. POWLEY d/b/a UNICORN SLIDE)	File No. BPCT-900518KO
)	
TRUDY M. MITCHELL)	File No. BPCT-900726KG
)	
For Construction Permit for a New)	
Commercial Television Station on Channel 54)	
in Slidell, Louisiana)	

MEMORANDUM OPINION AND ORDER

Issued: March 25, 1993;

Released: March 26, 1993

Background

1. This is a ruling on a Joint Request For Approval Of Settlement Agreement ("Joint Request") that was filed on February 1, 1993, by Caroline K. Powley d/b/a Unicorn Slide ("Powley") and Trudy M. Mitchell ("Mitchell"). Powley also filed on February 17, 1993, a Supplement To Settlement Agreement ("Supplement"). On February 26, 1993, Powley filed a further Statement ("Statement").

2. On March 5, 1993, Mitchell filed a Request For Itemization Of Expenses ("Request") and on that same date, Powell filed a Statement which included documentation that is relevant to its itemization of expenses ("Further Statement"). On March 10, 1993, Powley filed Comments On Request For Itemization Of Expenses ("Powley Comments"). On that same date, Mitchell filed Comments Of Trudy M. Mitchell ("Mitchell Comments"). On March 18, 1993, the Mass Media Bureau ("Bureau") filed Comments On Joint Request For Approval Of Settlement Agreement. The Bureau supports the settlement in the amount that is agreed to by the parties.

Facts And Discussion

3. Powley and Mitchell are the only two mutually exclusive applicants for a construction permit for a new FM Station on Channel 54 at Slidell, Louisiana. See Hearing Designation Order DA 92-1681, released January 11, 1993.

4. The Joint Petition contemplates that Powley's application will be voluntarily dismissed with prejudice in return for a payment of a sum of money not to exceed \$35,000, representing an amount that is no more than Powley's

actual legitimate and prudent expenses. Mitchell will receive the grant. ¹ The proposed agreement can be effected because Powley has demonstrated that its allowable costs total approximately \$44,000, and Powley has agreed to accept from Mitchell a lesser amount as a payoff.

5. The following standard was set by the Commission for the submission of professional expenses in "statement form:"

It [is] not necessary, however, to submit detailed descriptions of the number and job levels of persons providing professional services, or information as to hours and billings for professionals of various job levels. Nevertheless, a brief description of the nature of the specific activity and its connection with the comparative new proceeding should be provided.

Amendment of Section 73.3525, 6 F.C.C. Rcd 85, n. 54 (1990). (Emphasis added.)

6. On February 1, 1993, counsel for Powley submitted a signed Statement In Support Of Settlement under the letterhead of Baraff, Koerner, Olender & Hochberg, P.C., which recited that the law firm has been paid or is owed a total of \$17,800, plus expenses in the amount of \$469.11. The services are described as follows:

Maintaining the accuracy and currency of Ms. Powley's application; analyzing her comparative prospects; analyzing the application of her opponent, Trudy Mitchell, and developing and implementing strategy for bringing certain deficiencies in that application to the Commission's attention, which took the form of fairly extensive pleadings between us and counsel for Trudy Mitchell; counseling Ms. Powley with regard to the Hearing Designation Order and advising her of her procedural and substantive obligations; and negotiating, reaching and implementing a settlement with Ms. Mitchell in this proceeding.

The submission by Powell's attorney meet the Commission's standard. There was no itemization of the firm's out-of-pocket expenses but facially such expenses in the amount of \$469 are found to be reasonable in light of the scope of work performed.

7. On March 5, 1993, Powley submitted a sworn Declaration of her engineer, Mel Eleazar, who affirmed his performing the following work for Powell's Slidell application:

- engineering site study \$ 3,800

1 The grant to Mitchell will be conditioned on notification by Mitchell to AM Station WSLA in Slidell of a possible interference. Mitchell also must construct specified detuning apparatus. See HDO at Para. 12 and p. 6, infra.

- tower placement study	\$ 4,800
- engineering for application	\$ 5,200
- review of Mitchell's engineering and consulting with counsel	\$ 5,200
- out-of-pocket expenses ²	\$ 875
	\$19,875

Mr. Eleazar also described in "statement form" that his work on behalf of Powley for the Slidell application included initial engineering, a tower placement study, his completion of engineering required for the application process, his review of the opposing party's engineering, consulting with legal counsel, and assisting in oppositions that were filed against Mitchell's engineering. See Mel Eleazar Declaration at 1. The submission of the engineering expenses also meet the Commission's standards for professional work. See Para. 5, supra.

8. Ms. Powley filed a summary of expenses with her Statement of March 5, 1993, wherein she listed fifteen line-item expenses which totalled approximately \$6,370. ³ Powley has not included any line-item for her services which would not be a recoverable cost. See Amendment Of Section 73.3525, supra at 87. Except for her expenses in visiting New Hampshire, the line item expenses of Ms. Powley are allowed.

Mitchell's Concerns About Powley's Expenses

9. The Bureau's Comment states that the Settlement is limited to a payout to Powley of \$35,000 and that Powley's itemized expenses in that amount are legitimate and prudent costs that are appropriate for payment. However, there are unauthorized expenses for which Powley seeks approval. It is these unauthorized costs that are the subject of Mitchell's post settlement pleadings that are referred to above. For example, Powley would include in the universe of allowable costs the fees of Ron Baptist ("Baptist") who is represented to be

authorization under the Commission's rules to approve an unpaid contingent fee on the assertion that the fee was justified as a "prudent" or as an "out-of-pocket" expense. See Amendment Of Section 73.3525, 6 F.C.C. Rcd 85, 87 (1990).⁴ Powley will be limited to recovering only those expenses incurred in the preparation, filing, prosecution and settlement of the application. See 47 C.F.R. Section 73.3525 (i).⁵ However, Powley's other itemized expenses, which are legitimate and prudent and which are shown to have been incurred in connection with this proceeding, are limited to the \$25,000 settlement amount.

Settlement

10. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311 (c) (3). See Oak Television of Everett, Inc., et al., 92 F.C.C. 2d 926 (Review Bd 1983).

11. In this case, the Joint Petition was filed timely in accordance with §73.3525. The parties have represented under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. The Bureau has no objection to approving the settlement. It is determined that the parties have complied with 47 C.F.R. §§73.3525 (a)(1) and (a)(2) of the Commission's rules. In addition, a review of Powley's line-item expenses totalling in excess of \$35,000 as of February 1, 1993 (allowable legal and engineering expenses alone exceed that amount) has been made by the Presiding Judge and those allowable expenses are found to be legitimate and prudent in accordance with 47 C.F.R. §73.3575(a)(3) (1991).

12. There has been compliance with the local publication requirement of the Commission's rules. 47 C.F.R. §73.3594(g). The parties also have paid the required hearing fees. 47 C.F.R. §1.221(g). Commission resources will be conserved by the termination of this case prior to hearing. In addition, the public interest will be served by approval of this agreement which will eliminate the need for protracted litigation and the corresponding utilization of resources, and which ensures that a new FM service will be delivered to Slidell, Louisiana at an earlier date. Accordingly, it is appropriate that the proposed settlement be accepted.

ORDER

IT IS ORDERED that the Joint Request For Approval Of Settlement Agreement filed on February 1, 1993, as supplemented by Caroline K. Powley d/b/a Unicorn Slide and Trudy M. Mitchell, IS GRANTED and the Settlement Agreement IS ACCEPTED.

IT IS FURTHER ORDERED that the Request For Itemization filed on February 5, 1993, by Trudy M. Mitchell IS DENIED as moot.

IT IS FURTHER ORDERED that the application of Caroline K. Powley d/b/a Unicorn Slide (File No. BPCT-900518KO) IS DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of Trudy M. Mitchell (File No. BPCT-900726KG) to construct a New FM Station at Slidell, Louisiana IS GRANTED,

subject to the following condition:

Prior to construction of the tower authorized herein, Trudy M. Mitchell shall notify station WSLA, Slidell, Louisiana, so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Trudy M. Mitchell also shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results shall be submitted to the Commission.

IT IS FURTHER ORDERED that the admissions session set for June 2, 1993, and the hearing set for June 7, 1993, ARE CANCELLED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

Rec'd 5/3/93

BARAFF, KOERNER, OLENDER & HOCHBERG, P. C.

ATTORNEYS AT LAW
5335 WISCONSIN AVENUE, N. W., SUITE 300
WASHINGTON, D. C. 20015-2003
(202) 686-3200

D. JAY BARAFF
ROBERT L. OLENDER
JAMES A. KOERNER
PHILIP R. HOCHBERG
MARK J. PALCHICK
JAMES E. MEYERS

OF COUNSEL
ROBERT BENNETT LUBIC
FAX: (202) 686-8282

May 3, 1993

VIA HAND DELIVERY

Ms. Marilyn J. McDermett
Associate Managing Director
for Operations
Office of Managing Director
1919 M Street, N.W., Room 848
Federal Communications Commission
Washington, D.C. 20554

Re: Slidell, LA TV Proceeding

Dear Ms. McDermett:

Would you kindly substitute the undersigned in any further correspondence relative to the application of Caroline K. Powley d/b/a Unicorn Slide. Mr. Peltzman has left our firm and I have now assumed responsibility for the client.

I enclose a copy of your recent correspondence for your convenience and reference.

*WS attn R. Dorsey
pls note & make sure
paperwork gets to
appropriate people
send copy to GC
5/4/93
7:55 PM
ent*

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

April 30, 1993

OFFICE OF
MANAGING DIRECTOR

Lee J. Peltzman, Esq.
Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

Dear Mr. Peltzman:

This will respond to your request for refund of a hearing fee filed on behalf of Caroline K. Powley d/b/a Unicorn Slide in connection with her construction permit application for a new FM station at Slidell, Louisiana.

You state, and your documentation shows, that prior to the Notice of Appearance deadline, Caroline K. Powley voluntarily dismissed her application pursuant to a settlement agreement. The settlement agreement was subsequently approved, and the remaining applicant was granted without hearing. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(c)(4).

Accordingly, your request is granted. Although you requested a refund of \$6,770.00, the original check was drawn in the correct amount as set forth in 47 C.F.R. §1.1104(2)(c). Therefore, a check, made payable to the maker of the original check and drawn in the amount of \$6,760.00, **will be sent to you at the earliest practicable time.** If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,



Marilyn J. McDermett
Associate Managing Director
for Operations